

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

IN RE CHRYSLER-DODGE-JEEP ECODIESEL)
MARKETING, SALES PRACTICES, AND)
PRODUCTS LIABILITY LITIGATION) Case No. 3:17-md-02777-EMC
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**DECLARATION OF WILLIAM L. WEHRUM ASSERTING THE DELIBERATIVE
PROCESS PRIVILEGE**

I, William L. Wehrum, declare that the following statements are true and correct to the best of my knowledge and belief, that they are based upon my personal knowledge and on information supplied to me by employees under my supervision, and that they are provided in conjunction with the Privilege Log of the United States submitted in the above-captioned case.

1. I am Assistant Administrator for the United States Environmental Protection Agency ("EPA") Office of Air and Radiation ("OAR"), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460. OAR develops national programs, policies and regulations for controlling air pollution and radiation exposure. Among other responsibilities, OAR is responsible for administering the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 to 7671q. In the above-captioned action, EPA seeks injunctive relief and the assessment of civil penalties against FCA US LLC, V.M. Motori S.p.A., V.M. North America, Inc, and Fiat Chrysler Automobiles N.V. (collectively, "Defendants"), for violations of the CAA and the regulations promulgated thereunder.

2. On October 3, 1984, the Administrator of EPA delegated to Assistant Administrators the authority to assert, during judicial litigation, the deliberative process privilege with respect to documents and materials within the control of the Agency, such as documents and materials developed by personnel in their respective offices on EPA's behalf (National Delegation 1- 49, October 3, 1984; TN 106 approved July 20, 2016). In cases involving a large volume of materials, that policy memorandum permits the Assistant Administrator to assert the deliberative process privilege for documents based on a personal briefing or review of a representative sample of those documents.

3. I have received a personal briefing from OAR staff and the EPA Office of General Counsel ("OGC") regarding the matters discussed in Paragraph Six (6) below.

4. EPA is responding to the First Set of Request for Production of Documents, submitted by Defendants in the above-captioned case. To date, the United States has produced approximately 12,000 EPA documents in electronic format.

5. Attached to this Declaration is a list of 942 documents for which EPA OAR asserts the deliberative process privilege. In accordance with the October 3, 1984 Agency policy guidance cited in Paragraph 2, my staff has provided me with copies of 18 documents which constitute a representative sample of the 942 documents for which OAR asserts the deliberative process privilege. I have examined these 18 documents.

6. The 18 representative sample documents I personally reviewed were selected from three categories: drafts and discussions of proposed policy development, draft communications to outside parties, and draft plans for compliance testing and assessments.

7. The first category of documents I reviewed were drafts and discussions relating to proposed policy development. This category of documents involves internal communications about specific decision points for future policy actions, including regulatory actions and compliance and enforcement policy. It includes communications fully internal to the EPA, including the Office of Transportation and Air Quality (OTAQ), the Office of Enforcement and Compliance Assurance (OECA), and OGC. It also includes some communications between EPA and the California Air Resources Board (CARB), EPA's co-regulator in this enforcement action and other joint compliance, enforcement and litigation efforts.¹

8. Examples of the types of document that fall into this category that were included in the representative sample are:

- Emails between EPA employees and CARB discussing which test procedures to include in certain draft regulations. These exchanges represent preliminary discussions among staff, which are subject to further review and decision-making by senior management before being publicly proposed.
- Internal EPA emails exchanging draft language and strategy for decision documents and ongoing policy decisions. These emails generally represent staff opinions and discussions about issues under evaluation, but do not represent or discuss final decisions that have been taken by policymakers.

¹ EPA and CARB have two signed agreements in place for keeping confidential and privileged discussions of joint enforcement and litigation efforts like the above-captioned matter: one signed on April 23, 2007 that broadly covers "enforcement targeting and ongoing and potential enforcement matters of joint interest to the parties in anticipation of joint litigation," and one signed on June 24, 2016 that specifically governs communications related to the above-captioned matter. Confidential Disclosure Agreement for Clean Air Act Violations, California Air Resources Board and U.S. Environmental Protection Agency, April 23, 2007; Confidentiality Agreement ("Agreement") between the United States of America and California Regarding Claims Against Fiat Chrysler Automobiles N.V., et al., June 24, 2016.

- Draft presentation materials prepared for discussions between OECA, OTAQ, and CARB (in some cases) on compliance policy. These are materials compiled by EPA staff at an early stage of policy development to allow staff to discuss the best way to evaluate and present issues, and to provide management updates and a basis for future policy decisions. These do not contain any Agency decisions and their release would inhibit EPA staff's ability to deliberate amongst themselves.

9. The second category of documents I reviewed were draft communications to outside parties. This category of documents contains internal discussions for planning and drafting communications to external parties. All of these documents related to the overall communications strategy and decision-making surrounding the substantive decisions made in the above-captioned case. Some of these discussions are entirely between EPA employees in OTAQ, OECA, and OGC, and some are between EPA and CARB.

10. Examples of the types of document that fall into this category that were included in the representative sample are:

- Emails between EPA employees planning responses to press inquiries and press roll-out plans on the enforcement activities that led to the above-captioned case. EPA takes time and care in crafting responses to public requests for information as well as crafting external communication plans. These emails represent the back-and-forth deliberation of staff as to the most appropriate way to communicate recent developments and contain only drafts and not the final responses or plans.

11. The third category of documents that I reviewed were draft plans for compliance testing and assessments. This category of documents involves planning for emissions compliance testing, including draft decision-making about which tests to run and when. It also includes preliminary inquiries and assessments regarding potential noncompliance of the vehicles in this enforcement action. The decisions on how, what, and when to test vehicles that are reflected in this document were all part of EPA's overall strategy on whether and how to pursue the above-captioned case and other potential enforcement actions. This category includes purely internal EPA communications between OTAQ, OECA, and OGC, as well as communications between EPA and CARB.

Examples of the types of document that fall into this category that were included in the representative sample are:

- Communications between EPA and CARB discussing testing options. These emails include EPA and CARB staff providing individual opinions on the merits of various possible options that could be adopted as part of an ongoing testing project, but do not contain the specific final decisions for the testing program.
- Draft test plans shared between EPA employees. These test plans represent potential approaches under consideration for performing additional compliance testing to identify potential defeat devices or other compliance issues.
- Draft presentation materials prepared for discussions between OECA and OTAQ on the enforcement action leading to the above-captioned matter. As information became available, EPA staff developed numerous presentations for preliminary discussion and evaluation among staff and to provide updates to management.

These presentations include staff views on vehicle performance and possible next steps, but do not contain any final determinations or conclusions.

- Draft documents for a briefing on the enforcement action leading to the above-captioned matter. Part of the process for EPA to move forward on an enforcement action as far-reaching as the above-mentioned matter is for staff to brief senior management. These briefings contain EPA staff opinion on the status of the case at the time of the briefing and do not contain the full complement of data and information the team developed for the agency to initiate and pursue the enforcement action.

12. Disclosure of the documents in the three categories above would chill the open and candid discussion of ideas by those who participate in the regulatory, enforcement, and compliance decision-making process for light- and heavy-duty vehicles. These documents all represented preliminary staff views and the possibility that such views would be disclosed would hamper full exchange of ideas by staff. At the same time, since they do not represent final Agency decisions, their release is likely to cause public confusion as to the Agency's position, ultimately hindering the agency's ability to carry out its clean air protection mission. Based on the briefing my staff provided to me, and based on my review of the 18 documents constituting a representative sample of the 942 documents identified in three categories above, I have concluded that these documents satisfy the three-part test for protection from disclosure pursuant to the deliberative process privilege: (1) they are pre-decisional; (2) they are deliberative; and (3) harm will result from their disclosure. Specifically, all of these documents were prepared by Agency personnel to develop and offer analysis, recommendations, comments or advice on

then-pending Agency decisions regarding the above-captioned case and other matters of vehicle enforcement priorities, which is part of the process by which governmental decisions and policies are formulated.

13. The expression of these deliberations, and the "give and take" necessary to the informed implementation of the Clean Air Act, would be significantly hampered if these documents were the subject of discovery in litigation. Disclosure of the documents would chill the free and open discussion of enforcement and compliance decision-making that the Agency is considering or has considered in the past. If the authors of the documents had known that the documents would someday be released to the public and/or targets of the enforcement action, then these communications would likely not have been made, and EPA would not have been able to effectively carry out its responsibilities under the Clean Air Act. In addition, release of the documents would cause public confusion about the reason for an Agency decision. Staff persons involved in these communications do not have authority to make final decisions on the matters under discussion. Staff discussions, evaluations, or recommendations expressed in the documents at issue have no official or binding effect and may not represent the ultimate reasons for the agency's actions. The resulting harm to the Agency's internal deliberation process outweighs any potential benefit to the public or litigant from disclosure of the documents because their release would likely chill the free and open communication among staff and policy makers.

14. For the reasons explained above, I assert a deliberative process privilege for each of the 942 documents identified in Attachment 1 to this Declaration and referenced in the Privilege Log of the United States submitted for the above-captioned case.

Pursuant to 28 U.S.C. § 1746, and under penalty of perjury, I declare the foregoing is true and correct to the best of my knowledge.

Date

8-10-18

A handwritten signature in black ink, appearing to read 'W L Wehrum', written over a horizontal line.

William L. Wehrum
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency

Attachment 1 to Declaration of William L. Wehrum
EPA OAR List of Deliberative Process Documents